

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND**

ROBERT DONNELL PARKS

v.

UNITED STATES OF AMERICA

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Civil No. JFM-16-1392

Criminal No. JFM-95-347

MEMORANDUM

After a nine-day jury trial Robert Donnell Parks was convicted of murder in furtherance of a racketeering activity, conspiracy to murder as part of a racketeering activity, and conspiracy to distribute heroin, in violation of 18 U.S.C. §§ 1959(a)(1), (a)(5) and 21 U.S.C. § 846. Criminal judgment was entered on the docket on August 1, 1996. *See United States v. Parks*, Criminal No. JFM-95-347 (D. Md.). The criminal judgment was affirmed on appeal on October 28, 1997. *Id.* at Paper No. 73; see also *United States v. Parks*, 129 F.3d 118 (4th Cir. 1997). Parks' petition for writ of certiorari was denied by the Supreme Court on February 23, 1998. *See Parks v. United States*, 522 U.S. 1142 (1998).

On October 30, 2001, Parks' first 28 U.S.C. § 2255 motion was denied and dismissed with prejudice as time-barred. *See United States v. Parks*, Criminal No. JFM-95-347 (D. Md.) at Paper 77 & 78. In addition, his motion to reopen the dismissal of his motion to vacate was denied on March 24, 2010. *Id.* at ECF No. 84 & 85.

On May 9, 2016, Parks filed his most recent self-represented § 2255 motion.¹ *Id.* at ECF No. 86. Generously construing the document, Parks claims that his prior convictions cannot stand in light of the Supreme Court decision in *Johnson v. United States*, 135 S. Ct. 2551 (2015), made

retroactive to prior criminal cases by *Welch v. United States*, 136 S. Ct. 1257 (2016). He maintains that his sentence was enhanced under Sentencing Guideline § 4B1.1 as a “career offender” and he should be resentenced under *Johnson*. See *United States v. Parks*, Criminal No. JFM-95-347 (D. Md.) at ECF No. 86.

Several circuits have determined that dismissal of a motion as time-barred is a decision on the merits for the purpose of deciding whether subsequent petitions are second or successive. See e.g. *Murray v. Greiner*, 394 F.3d 78, 81 (2d Cir. 2005); *Altman v. Benik*, 337 F.3d 764 (7th Cir. 2003) (*per curiam*); *McNabb v. Yates*, 576 F.3d 1028, 1030 (9th Cir. 2009); *In re Rain*, 659 F.3d 1274, 1275 (10th Cir. 2011).

Insofar as the recent motion raises an attack on Parks’ sentences, the challenge amounts to a successive motion to vacate sentence filed pursuant to 28 U.S.C. § 2255. See *Swain v. Pressley*, 430 U.S. 377-78 (1977); *In re Jones*, 226 F.3d 328, 332 (4th Cir. 2000). A “second or successive” petition for relief under § 2255 may not be filed in a district court unless the petitioner first obtains the “gatekeeping” authorization of the court of appeals certifying that the petition conforms to specified statutory requirements. See 28 U.S.C. §§ 2255, 2244(b)(3)(A). The Fourth Circuit must first enter an order authorizing this court to consider the successive filing before this court can examine the merit of his claims. See § 2244(b)(3)(A); *Felker v. Turpin*, 518 U.S. 651, 664 (1996).


The Fourth Circuit has denied Parks authorization to file a second or successive § 2255 motion. See *United States v. Parks*, Criminal No. JFM-95-347 (D. Md.) at ECF No. 88. Upon review of the record, it concluded that Parks’ sentence was not based on the career offender

¹ With Judge Benson E. Legg’s retirement, the case was reassigned on May 10, 2016.

sentencing guideline, but was instead based on a cross-reference to the base offense level for first-degree murder.² See *United States v. Parks*, Criminal No. JFM-95-347 (D. Md.) at ECF No. 88. For this reason, the motion shall be denied and dismissed.

Parks has no absolute entitlement to appeal the denial of his § 2255 motion. See 28 U.S.C. § 2253(c)(1). A certificate of appealability may issue only if the applicant has made a substantial showing of the denial of a constitutional right. *Id.* at §2253(c)(2). Parks “must demonstrate that reasonable jurists would find the district court’s assessment of the constitutional claims debatable or wrong,” *Tennard v. Dretke*, 542 U.S. 274, 282 (2004) (quoting *Slack v. McDaniel*, 529 U.S. 473, 484 (2000)), or that “the issues presented were ‘adequate to deserve encouragement to proceed further,’ *Miller-El v. Cockrell*, 537 U.S. 322, 335-36, (2003) (quoting *Barefoot v. Estelle*, 463 U.S. 880, 893 n. 4 (1983)). The court declines to issue a certificate of appealability because Parks has not made the requisite showing. A separate Order follows.

Date: June 30, 2016


J. Frederick Motz
United States District Judge

² The government filed a motion to dismiss arguing that Parks’ motion should be denied as he did not obtain Fourth Circuit authorization to file a successive motion and he is not eligible for relief under *Johnson* as he was not sentenced as a career offender. See *United States v. Parks*, Criminal No. JFM-95-347 (D. Md.) at ECF No. 87.